

Phillip C. Wopshall appeals his conviction for operating a vehicle while intoxicated as a class A misdemeanor.¹ Wopshall raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Wopshall's multiple requests for continuances but later sua sponte ordering a continuance of the trial. We affirm.²

The relevant facts follow. On April 29, 2007, a Hendricks County Sheriff's Deputy observed Wopshall driving erratically and initiated a traffic stop. As a result, the State charged Wopshall with operating a vehicle while intoxicated in a manner that endangers a person as a class A misdemeanor, operating a vehicle with a BAC greater than 0.08% as a class C misdemeanor, and driving left of center as a class C infraction.

On May 16, 2007, July 16, 2007, and August 22, 2007, the trial court granted Wopshall's motions to continue the trial. Wopshall apparently then requested a suppression hearing, and the trial court entered the following order:

Court takes no action on request for Suppression Hearing and resets the Bench Trial to 12/10/07 at 9:00 a.m. Defense counsel shall file a motion to suppress and Court will set hearing at that time.

Appellant's Appendix at 4. Wopshall then filed a motion to set the matter for a guilty plea hearing, and the trial court converted the December 10, 2007 trial date to a guilty plea hearing. However, on December 10, 2007, the trial court noted that Wopshall had filed a motion to suppress and set the matter for hearing on the motion to suppress and

¹ Ind. Code § 9-30-5-2 (2004).

² We remind Wopshall that, under Ind. Appellate Rule 50(B)(1), the appellant's appendix must contain a table of contents.

the bench trial on January 3, 2008. Due to court congestion, the trial court continued the trial date to February 28, 2008.

In January 2008, Wopshall filed requests for production to non-parties, the Hendricks County Sheriff's Department and the Indiana Department of Toxicology. On February 18, 2008, and February 26, 2008, Wopshall filed motions to continue the trial, which the trial court denied. Six days prior to the scheduled trial, Wopshall also filed a motion to compel regarding the requests for production, which the trial court denied. The trial court later continued the trial due to court congestion and reset the trial for April 24, 2008. On April 17, 2008, April 21, 2008, and April 22, 2008, Wopshall again filed motions to continue the trial, which the trial court denied.

At the suppression hearing on April 24, 2008, Wopshall objected to the officer's testimony because the Sheriff's Department had failed to respond to the discovery requests. The trial court continued the trial to June 4, 2008, and ordered the Sheriff's Department to provide the requested information within seven days. Wopshall then filed a motion to dismiss due to the alleged discovery violations, and he also filed a motion for change of judge, arguing that the trial court judge was biased. After a hearing, the trial court denied both motions.

At the June 4, 2008 bench trial, the trial court found Wopshall not guilty of operating while intoxicated as a class C misdemeanor, found Wopshall guilty of operating while intoxicated as a class A misdemeanor, and did not enter judgment on the driving left of center charge due to double jeopardy concerns. The trial court sentenced

Wopshall to 365 days in jail with credit for two days and 363 days suspended to probation.

The issue is whether the trial court abused its discretion by denying multiple requests for continuances but later sua sponte ordering a continuance of the trial. “The determination of whether to grant a continuance lies within the sound discretion of the trial court when the motion is not based upon statutory grounds.” Warner v. State, 773 N.E.2d 239, 247 (Ind. 2002). “There is a strong presumption that the trial court properly exercised its discretion.” Id.

Wopshall argues that the trial court abused its discretion when it denied his repeated requests for continuances in February 2008 and April 2008 but later granted a continuance during the suppression hearing. Wopshall argues that the trial court was biased because it granted a continuance “only when it became clear that doing so benefited the State.” Appellant’s Brief at 9. According to Wopshall, the trial court’s grant of a continuance during the suppression hearing denied him the opportunity to establish a violation under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

We first address Wopshall’s Brady argument. The Indiana Supreme Court has explained that, under Brady, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or the bad faith of the prosecution.” Stephenson v. State, 864 N.E.2d 1022, 1056 (Ind. 2007) (quoting Brady, 373 U.S. at 87, 83 S. Ct. at 1196-1197), reh’g denied, cert. denied, 128 S. Ct. 1871 (2008). To establish a Brady violation, a defendant must show that: (1) the prosecution suppressed evidence;

(2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial. Id. at 1056-1057 (quoting Conner v. State, 711 N.E.2d 1238, 1245-46 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 829, 121 S. Ct. 81 (2000)). The evidence is material under Brady if “the defendant . . . establish[es] a reasonable probability that the result of the proceeding would be different if the State had disclosed [the] evidence.” Id. at 1057 (quoting Azania v. State, 730 N.E.2d 646, 655 (Ind. 2000), reh'g denied).

Wopshall’s reliance upon Brady is misplaced. First, Wopshall has failed to demonstrate that the evidence was material or favorable to the defense. Moreover, the Indiana Supreme Court has held that, “[i]f the favorable evidence becomes known to the defendant before or during the course of a trial, Brady is not implicated.” Williams v. State, 714 N.E.2d 644, 649 (Ind. 1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195 (2000). Wopshall makes no argument that the State failed to provide the requested information prior to the actual trial in June 2008. In fact, at the June 2, 2008 hearing on Wopshall’s motion to dismiss, his counsel informed the trial court that he had the information needed to try the case. Transcript at 41, 46. We conclude that Wopshall’s Brady argument fails. See, e.g., McManus v. State, 814 N.E.2d 253, 264 (Ind. 2004) (rejecting the defendant’s Brady argument because “[a]t moments when it mattered, evidence about McManus’s medication was laid out for all to see”), reh'g denied, cert. denied, 546 U.S. 831, 126 S. Ct. 53 (2005).

Wopshall also implies that the trial court was biased against him because it denied his motions. “The law presumes that a judge is unbiased and unprejudiced.” Timberlake v. State, 753 N.E.2d 591, 610 (Ind. 2001), reh'g denied, cert. denied, 537 U.S. 839, 123

S. Ct. 162 (2002). “Merely asserting bias and prejudice does not make it so.” Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002). “[A]dverse rulings and findings by a trial judge are not sufficient reasons to believe the judge has a personal bias or prejudice per se.” Taylor v. State, 587 N.E.2d 1293, 1303 (Ind. 1992), reh’g denied. The fact that the trial court denied some of Wopshall’s motions simply does not rebut the presumption that the trial court judge was unbiased.

Finally, as for the continuances, we note that “[a] trial judge has the responsibility to direct the trial in a manner that facilitates the ascertainment of truth, ensures fairness, and obtains economy of time and effort commensurate with the rights of society and the criminal defendant.” Cliver v. State, 666 N.E.2d 59, 64 (Ind. 1996), reh’g denied. “Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated.” Id.

The trial court denied Wopshall’s motions for continuances and motion to compel because it did not want to delay the trial and because Wopshall had failed to comply with the trial rules in requesting the discovery. When the trial court granted a continuance and ordered the discovery to be provided within seven days, the trial court thought Wopshall would benefit from the continuance because he would have the necessary discovery at the trial. The trial court thought it “was being fair so that [Wopshall] would have that information.” Transcript at 35. Under these circumstances, we cannot say that the trial court abused its discretion by denying Wopshall’s motions for continuances but later sua sponte granting a continuance.

For the foregoing reasons, we affirm Wopshall's conviction for operating a vehicle while intoxicated as a class A misdemeanor.

Affirmed.

ROBB, J. and CRONE, J. concur